U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 January 2006

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In the Matter of:

AVERY R. MORGAN,
Claimant,

v. **Case No. 2004-BLA-05787**

EASTERN ASSOCIATED COAL CORP.,
Employer, and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party in Interest.
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Appearances:

S.F. Raymond Smith, Esq., Rundle and Rundle, Pineville, WV
For Claimant

Paul Frampton, Esq., Bowles, Rice, McDavid, Graff & Love, Morgantown, WV
For Employer

No appearance on behalf of the Director

Before: PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a modification request relating to a duplicate or subsequent claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §901, *et. seq.* (hereafter "the Act"). The claim concerned here was filed by Claimant Avery R. Morgan ("Claimant") on January 31, 2001, and modification was sought on November 3, 2003. The putative responsible operator is Eastern Associated Coal Corporation ("Employer"), which is self-insured through Peabody Investments, Inc. No payments are being made by the Black Lung Disability Trust Fund.

Part 718 of title 20 of the Code of Federal Regulations is applicable to this claim, as it was filed after March 31, 1980, and the regulations amended as of December 20, 2000 are also applicable, as this claim was filed after January 19, 2001. 20 C.F.R. § 718.2. In *National Mining Assn. v. Dept. of Labor,* 292 F.3d. 849 (D.C. Cir. 2002), the U.S. Court of Appeals for the D.C. Circuit rejected a challenge to, and upheld, the amended regulations with the exception of several sections which were found to be impermissibly retroactive and one which attempted to effect an unauthorized cost shifting. The Department of Labor amended the regulations on December 15, 2003, solely for the purpose of complying with the Court's ruling. 68 Fed. Reg. 69929 (Dec. 15, 2003).

The findings of fact and conclusions of law which follow are based upon my analysis of the entire record, including all evidence admitted and arguments made. Where pertinent, I have made credibility determinations concerning the evidence.

STATEMENT OF THE CASE

The instant claim is the third one filed by the Claimant.

Claimant's first claim for Black Lung benefits was filed on June 18, 1997. (DX 1).[1] That claim was denied by a Claims Examiner on September 30, 1997, based upon Claimant's failure to establish that he was totally disabled by the disease (pneumoconiosis). *Id.* No appeal was filed.

The second claim was filed on August 18, 1999. (DX 1). On January 31, 2000, that claim was also denied by a Claims Examiner, again based upon Claimant's failure to establish that he was totally disabled by the disease as well as his failure to establish a material change in conditions since the denial of the previous claim. *Id.* As no appeal was filed, that decision became final. *Id.*

The instant claim was filed on January 31, 2001. (DX 4). A medical examination was conducted by Dr. Mohammed I. Ranavaya on March 20, 2001. (DX 11). On June 6, 2002, the district director's office issued a "Schedule for the Submission of Additional Evidence" which indicated that they had made the following preliminary conclusions:

1. The claimant would not be entitled to benefits if we issued a decision at this time; and
2. The coal mine operator named above ["Eastern Associated Coal Corp. C/O Old Republic Insurance Co.," self-insured through Peabody Investments Inc.] is the responsible operator liable for the payment of benefits.

(DX 24). The Employer controverted the claim as well as its designation as responsible operator. (DX 18, 22, 23). On May 1, 2003, the District Director issued a Proposed Decision and Order Denial of Benefits, which denied benefits because, although the evidence showed that the Claimant had pneumoconiosis that was caused at least in part by coal mine employment, the

[1] References to exhibits admitted into evidence at the November 18, 2004 hearing appear as "DX" for Director's Exhibits and "EX" for Employer's Exhibits, followed by the exhibit number. References to the hearing transcript appear as "Tr." followed by the page number.

evidence did not show that the disease caused a breathing impairment of sufficient degree to establish total disability within the meaning of the Act and the regulations (DX 34). Claimant requested a hearing by counsel's letter of July 23, 2003. (DX 37). The request was denied as untimely by a Claims Examiner. (DX 38). Subsequent correspondence of October 31, 2003 requested modification based upon a mistake of fact, and the October 2, 2003 examination report of Dr. Rasmussen was submitted in support. (DX 39, 40). The district director issued a Proposed Decision and Order Denying Request for Modification on December 23, 2003. (DX 41). Claimant again requested a hearing by counsel's letter of December 30, 2003. (DX 42). On February 24, 2004, the case was transmitted for a hearing. (DX 43).

A hearing was held before the undersigned administrative law judge on November 18, 2004. Neither party submitted a Prehearing Report or evidence designation form.[2] At the hearing, Director's Exhibits 1 through 46, and Employer's Exhibits 1 through 9 were admitted into evidence. (Tr. 7-8, 21-23). The record was kept open until January 15, 2005 (subject to a 30-day extension by stipulation) for the submission of a report by Dr. Tuteur [mistranscribed as "Tudor"] (or another doctor) and the transcript of Dr. Zaldivar's deposition, and that period was thereafter extended to February 15, 2005 by the stipulation of the parties. (Tr. 5-7, 26-27). The report and curriculum vitae of Dr. Tuteur were submitted as Employer's Exhibit 10, and the transcript of Dr. Zaldivar's February 7, 2005 deposition was submitted as Employer's Exhibit 11.[3] By letter of March 3, 2005, the parties were given until March 22, 2005 to submit any briefs or written closing arguments. Employer's written closing argument, dated March 17, 2005, was filed on March 22, 2005. No brief was filed by the Claimant. Employer's Exhibits 10 and 11 are admitted into evidence and the record is closed. **SO ORDERED.** The case is now ready for decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Issues/Stipulations

As noted above, the instant case is a modification request, filed at the district director level, relating to the denial of a subsequent claim. The parties have suggested that all of the issues are subsumed in the modification issue. (Tr. 8 to 9). For unknown reasons, the district director did not listed "Subsequent Claims" as an issue, although the two prior claims were noted in the transmittal memorandum. (Tr. 43 to 45). In any event, the threshold issue is whether there is a basis for modification under 20 C.F.R. §725.310, and as a basis for modification would also provide a basis for reopening of the subsequent claim under 20 C.F.R. §725.310, there is no practical significance to the omission.

On the issue of length of coal mine employment, the parties stipulated to the 18 years found by the Director. (Tr. 8).

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[2] The parties were supposed to submit their evidence designations when the record was complete (Tr. 5) but failed to do so. As the submissions comply with the evidentiary limitations, inasmuch as a claim plus a modification request are involved here, I find no need to delay proceedings further for the submission of the evidence summary forms.

[3] Although Employer indicated that the report and c.v. of Dr. Tuteur (EX 10) were being transmitted under cover letter of January 14, 2005, the reports were not attached. As requested in my March 3, 2005 correspondence, they were filed on March 10, 2005. Dr. Zaldivar's deposition transcript (EX 11) was filed on February 17, 2005.

Accordingly, the issues for resolution by this tribunal are:

1. Whether Claimant has pneumoconiosis as defined by the Act and the regulations;

2. Whether Claimant's pneumoconiosis arose out of coal mine employment;

3. Whether Claimant is totally disabled;

4. Whether Claimant's disability is due to pneumoconiosis;[4]

5. Whether the Employer is the responsible operator;

6. Whether there is a basis for modification under 20 C.F.R. §725.310.[5]

(DX 43). In addition to the above, the Employer listed a number of issues for appellate purposes. (DX 24, 32; Tr. 22-23). While not listed on the transmittal form, those issues are preserved.

Evidence

Claimant's Hearing Testimony

Claimant testified that he was born in January 1944 and was married with two children (ages 23 and 28). (Tr. 11 to 12). The 28-year-old child was in computer school but the other child was working. (Tr. 12). At the time of the hearing, Claimant's source of income was Social Security and retirement. (Tr. 15).

Claimant testified that he was not currently employed and his last employer was Phillips Coal Company, at the Saturn 4 mine in Summersville, West Virginia, where he worked in 1991. (Tr. 12, 14). At the Saturn 4 mine, the ceiling was 36 to 38 inches high. (Tr. 13). He worked at that mine site, running the continuous miner underground, for eight months, and that was his last coal mine work. (Tr. 12-13, 18). Over the course of his mining career, he spent 15 years running the continuous miner. (Tr. 13). He would sit on the machine and run it with hydraulic levers. (Tr. 13, 18). He ran the miner for about six hours, with the remaining two hours spent "tramming" or moving the machine. (Tr. 19). He would also help with the miner cable, whatever needed to be done. (Tr. 13-14). He estimated that the miner cable weighed 50 to 75 pounds or more; 75 pounds was his best estimate. (Tr. 19). Although he would lift the cable up and hook it on the machine, the machine actually dragged the cable. (Tr. 20). His employment with Eastern Associated Coal Corporation was in the mid-1970's. (Tr. 14). He estimated that he worked there from 1974 or 1975 until May of 1977. (Tr. 15-16). Next, he worked for Phillips in Highland, West Virginia, for about 11 years, at Island Creek. (Tr. 14-15, 16). He started out with a loader and then he ran the miner. *Id.* He worked for Island Creek Coal Company before

[4] The failure by the district director to list this issue was obviously in error, as total disability due to pneumoconiosis may not be conceded when both total disability and pneumoconiosis are disputed. Further, the Employer listed disability causation as an issue. (DX 20). The list of issues is amended to so reflect. **SO ORDERED.**

[5] Because the instant case involves the third claim filed by the Claimant, and the last previous denial was final, there is also a threshold issue – whether there is a basis for reopening the claim under 20 C.F.R. §725.309, as amended. For unknown reasons, that issue was not listed by the district director.

he worked for Eastern, and he went to Eastern when they shut down. (Tr. 16). After working for Phillips, he went to work for Carmack Coal Company, which was also owned by Phillips. (Tr. 16). After that he worked for a coal company called Saturn Coal Company, which was also owned by Phillips, for two years, until 1990. (Tr. 17). He clarified that after leaving Eastern in 1976 or 1977, he worked for Phillips Coal Company or some other company owned by Mr. Phillips for 14 or 15 years. (Tr. 17-18). All of his coal mine employment was underground. (Tr. 15).

DISCUSSION AND ANALYSIS

Evidentiary Limitations

My consideration of the medical evidence is limited under the regulations, which apply evidentiary limitations to all claims filed after January 19, 2001. 20 C.F.R. §725.414. Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. *Dempsey v. Sewell Coal Co.*, 21 BLR --, BRB No. 03-0615 BLA (June 28, 2004) (en banc) (slip op. at 3), *citing* 20 C.F.R. §§725.414; 725.456(b)(1). Under section 725.414, the claimant and the responsible operator may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." *Id., citing* 20 C.F.R. §725.414(a)(2)(i),(a)(3)(i). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." *Id., citing* 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id.* "Notwithstanding the limitations" of section 725.414(a)(2),(a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." *Id., citing* 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." *Id.*, *citing* 20 C.F.R. §725.456(b)(1).

The parties cannot waive the evidentiary limitations, which are mandatory and therefore not subject to waiver. *Phillips v. Westmoreland Coal Co.*, 2002-BLA-05289, BRB No. 04-0379 BLA (BRB Jan. 27, 2005) (unpub.) (slip op. at 6).

The Benefits Review Board discussed the operation of these limitations in its en banc decision in *Dempsey, supra*. First, the Board found that it was error to exclude CT scan evidence because it was not covered by the evidentiary limitations and instead could be considered "other medical evidence." *Dempsey* at 5; *see* 20 C.F.R. § 718.107(a) (allowing consideration of medical evidence not specifically addressed by the regulations). Further, the Board found that it

was error to exclude pulmonary function tests and arterial blood gases derived from a claimant's medical records simply because they had been proffered for the purpose of exceeding the evidentiary limitations. *Dempsey* at 5. However, the Board found that records from a state claim were properly excluded as they did not fall within the exception for hospitalization or treatment records or the exception for prior federal black lung claim evidence (under 20 C.F.R. §725.309(d)(1)). *Dempsey* at 6. On the issue of good cause for waiver of the regulations, the Board noted that a finding of relevancy would not constitute good cause and therefore records in excess of the limitations offered on that basis, and on the basis that the excluded evidence would be "helpful and necessary" for the reviewing physicians to make an accurate diagnosis, were properly excluded. *Id.* at 6. Finally, the Board stated that inasmuch as the regulations do not specify what is to be done with a medical report that references inadmissible evidence, it was not an abuse of discretion to decline to consider an opinion that was "inextricably intertwined" with excluded evidence. *Id.* at 9. Referencing *Peabody Coal Co. v. Durbin,* 165 F.3d 1126, 21 BLR 2-538 (7th Cir. 1999), the Board acknowledged that it was adopting a rule contrary to the common law rule allowing inadmissible evidence to be considered by a medical expert, because "[t]he revised regulations limit the scope of expert testimony to admissible evidence." *Dempsey* at 9-11.

Here, the evidence from the prior two claims is allowable because evidence from prior federal black lung claims is admissible under 20 C.F.R. §725.309(d)(1).

In addition to an initial (subsequent) claim being involved, this case involves a modification request that was filed at the district director level. The revised language at 20 C.F.R. §725.310(b) (2001) contains limitations on the submission of medical evidence on modification and provides, in part, as follows:

> Modification proceedings shall be conducted in accordance with the provisions of this part as appropriate, except that the claimant and the operator, or group of operators or the fund, as appropriate, shall each be entitled to submit no more than one additional chest X-ray interpretation, one additional pulmonary function test, one additional blood gas study, and one additional medical report in support of its affirmative case along with such rebuttal evidence and additional statements as are authorized by paragraphs (a)(2)(ii) and (a)(3)(ii) of §725.414.

20 C.F.R. §725.310(b) (2001). Accordingly, for a modification request, only one study or report may be submitted in each of the evidentiary categories. The issue arises as to whether the Employer is now precluded from filing any initial evidence or rebuttal to the evidence that was submitted in connection with the subsequent claim before the modification request was filed, because it failed to do so at the district director level. However, in view of the reference in the regulation to "one additional" study or report, it is reasonable to assume that the parties may submit the number of studies or reports allowed for an initial claim plus the additional studies and reports allowed on modification. Moreover, I find that it would be prejudicial to prevent the Employer from submitting evidence relating to the initial denial before me, which it would otherwise be permitted to do, simply because a modification request is also involved.

In view of the above, I find that the record before me is in compliance with the evidentiary limitations.

Modification

The standards for granting a request for modification of a previous denial of benefits, as the Claimant seeks here, are set forth in the regulations at 20 C.F.R. §725.310(a). That regulation states, in pertinent part:

> Upon . . . the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the district director may, . . . at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits.

To determine whether there has been a change in conditions, the administrative law judge must "perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element or elements which defeated entitlement in the prior decision." *Napier v. Director, OWCP,* 17 B.L.R. 1-111, 113 (1993); *Natolini v. Director, OWCP,* 17 B.L.R. 1-82, 1-84 (1993). An administrative law judge may grant modification premised upon a mistake in determination of fact based upon an allegation that the ultimate fact was mistakenly decided; "[t]here is no need for a smoking-gun factual error, changed conditions, or startling new evidence." *Jessee v. Director, OWCP,* 5 F.3d 723, 725 (4th Cir. 1993). The *Jessee* court continued by explaining that, in looking for a mistake in fact: "No new evidence is required. A claims examiner may 'correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.'" *Id.* at 724 (quoting *O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971) (per curiam) (decided under Longshore and Harbor Workers' Compensation Act)). If a basis for modification is found, the claim must be considered on the merits, based upon all the evidence of record. *See Kovac v. BCNR Mining Corp.*, 14 B.L.R. 1-156, 1-158 (1990), *modified on recon.*, 16 B.L.R. 1-71, 73 (1992).

The regulations relating to subsequent claims also premise a reopening upon a showing that one of the conditions of entitlement has changed:

> (d) If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see §725.502(a)(2)), the later claim shall be considered a subsequent claim for benefits. **A subsequent claim** shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part, except that the claim **shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement** (see §§725.202(d) (miner), 725.212 (spouse), 725.218 (child), and 725.222 (parent, brother, or sister)) **has changed since the date upon which the order denying the prior claim became final.**[6]

[6] For a miner, the conditions of entitlement include whether the individual (1) is a miner as defined in the section; (2) has met the requirements for entitlement to benefits by establishing pneumoconiosis, its causal relationship to

> The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:
> (1) Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.
> (2) For purposes of this section, **the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based.** For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.
> (3) **If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement.** . .
> (4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim. . . .[Emphasis added.]

20 C.F.R. § 725.309(d).

Here, the instant claim (like the prior claims) was denied based upon the Claimant's failure to establish total disability due to pneumoconiosis. Thus, I must first determine whether the evidence establishes that the Claimant is totally disabled from a pulmonary or respiratory standpoint. As the modification is sought based upon a mistake in determination of fact, I will consider all of the evidence submitted in connection with the new claim.

Total Disability

The regulations as amended provide that a claimant can establish total disability by showing pneumoconiosis prevented the miner "[f]rom performing his or her usual coal mine work," and "[f]rom engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time." 20 C.F.R. §718.204(b)(1). Where, as here, there is no evidence of complicated pneumoconiosis, total disability may be established by pulmonary function tests, arterial blood gas tests, evidence of cor pulmonale with right sided congestive heart failure, or physicians' reasoned medical opinions, based on medically acceptable clinical and laboratory diagnostic

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coal mine employment, total disability, and contribution by the pneumoconiosis to the total disability; and (3) has filed a claim for benefits in accordance with this part. 20 C.F.R. §725.202(d) *Conditions of entitlement: miner.*

techniques, to the effect that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in the miner's previous coal mine employment or comparable work. 20 C.F.R. §718.204(b)(2). For a living miner's claim, it may not be established solely by the miner's testimony or statements. 20 C.F.R. §718.204(d)(5).

According to his testimony, Claimant's last and usual coal mine employment was operating a continuous miner, a job which required occasional heavy lifting of the miner cable, which weighed approximately 75 pounds, in order to connect the cable to the machine. For about six hours of an eight-hour shift, he would sit on the machine and run it, and for the remaining two hours, he would move or tram the machine. For the reasons set forth below, I find that the Claimant has established that he was totally disabled from performing that task or comparable employment based upon a pulmonary or respiratory disability, under the regulatory criteria.

Pulmonary function tests. Claimant has not established total disability through qualifying pulmonary function tests. Under subparagraph (i), total disability is established if the FEV1 value is equal to or less than the values set forth in the pertinent tables in 20 C.F.R. Part 718, Appendix B, for the miner's age, sex and height, if in addition, the tests reveal FVC or MVV equal to or less than the values under the tables, or an FEV1/FVC ratio of 55% or less. The pulmonary function tests produced the following pre-bronchodilator and post-bronchodilator values [with qualifying values for heights of 73.2 inches and 74 inches, respectively, bracketed below]:

Date; Age/Height	**Exhibit No.**	**FEV1** (pre/post)	**FVC** (pre/post)	**MVV** (pre/post)	**FEV1/FVC** (pre/post)
03/20/2001 57/74 inches	DX 11 (DOL)	2.56 [2.36, 2.42]	3.27 [2.99, 3.06]	None recorded	78.4% [55%]
08/14/2002 58/73 inches	EX 4 (Employer)	2.48/2/56 [2.34, 2.40]	3.77/3.77 [2.97, 3.05]	96/125 [94, 96]	66%/68% [55%]
10/02/2003 59/73 inches	DX 40 (Claimant)	2.34/2.55 [2.33, 2.39]	3.39/3.91 [2.95, 3.03]	99/108 [93, 96]	69%/65% [55%]
08/11/2004 60/73 inches	EX 5 (Employer)	2.35/2/40 [2.31, 2.37]	3.77/3.75 [2.93, 3.01]	None recorded	62%/64% [55%]

None of the new pulmonary function tests produced qualifying values for the Claimant's age and recorded height. *See* 20 C.F.R. §718.204(b)(2)(i). If the Claimant's height were 74 inches as opposed to 73 inches for the last three tests, the FEV1 values would be qualifying. However, as three out of the four tests measured the Claimant as being 73 inches tall, I find no basis for substituting the height found on the first test. Furthermore, none of the other values are qualifying for the recorded heights. Accordingly, I find that the pulmonary function tests are not qualifying under the regulatory criteria and therefore do not support a finding of total disability under §718.204(b)(2)(i).

Arterial blood gases. Claimant has, however, satisfied the burden of proving total disability through the exercise arterial blood gas studies under §718.204(b)(2)(ii). The newly submitted arterial blood gas studies produced the following values (rest/exercise):

Date	Exhibit No.	PCO2 (rest/exercise)	PO2 (rest/exercise)	Qualifying?
03/20/2001	DX 11 (DOL)	44	64	No
08/14/2002	EX 6 (Employer)	41/42	72/58	No/Yes
10/02/2003	DX 40 (Claimant)	41/43 ["rest" value is baseline]	64/52	No/Yes
08/11/2004	EX 7 (Employer)	39/40	66/54	No/Yes

The regulations set forth the required pO2 values for establishing total disability based upon recorded pCO2 values; for pCO2 values in the 40 to 49 range, the pO2 must be below 60, and for a pCO2 value of 39, the pO2 value must be less than 61 (for the pertinent altitude). Appendix C to Part 718. While the resting values for all four tests were not qualifying, the last three tests produced qualifying values during exercise under the regulatory standards set forth in 20 C.F.R. Part 718, Appendix C; for the first test, no exercise values were taken because the Claimant complained of dizziness. An administrative law judge must provide a rationale for according greater probative value to the results of one study over those of another. *Coen v. Director; OWCP,* 7 B.L.R. 1-30 (1984); *Lessar v. C.F. & I. Steel Corp.*, 3 B.L.R. 1-63 (1981). I find the values produced during exercise to be more probative of Claimant's ability to perform his last coal mine employment, because it assesses his oxygen levels during physical exertion, which was required to a certain extent by his last coal mine work. In considering the blood gas studies along with the Claimant's job description, which includes moving a machine and occasionally lifting a seventy-five pound cable, I find that the arterial blood gases support a finding that he is totally disabled and not capable of performing his last and usual coal mine employment as a miner operator. Based upon consideration of all the evidence, I find that Claimant has satisfied section 718.204(b)(2)(ii).

Cor pulmonale with right-sided congestive heart failure. There is no evidence of cor pulmonale or congestive heart failure, so Claimant has not established total disability under section 718.204(b)(2)(iii).

Medical opinion evidence on total disability. I also find that Claimant has established total disability through reasoned medical reports. In connection with the instant claim, the following physicians provided medical opinions addressing the issue of whether Claimant is totally disabled due to pneumoconiosis:

(1) **Dr. Mohammed A. Ranavaya** conducted the Department of Labor examination on March 20, 2001 (DX 11). He took a detailed history, recorded that the Claimant complained of shortness of breath on mild to moderate exertion, and on examination noted a minimally prolonged expiratory phase with scattered wheezes. *Id.* He noted that the Claimant worked in the underground coal mines for 25 years and that he smoked cigarettes at a rate of a pack every three to four days, dating from 1969. *Id.* Dr. Ranavaya opined that the Claimant had moderate

pulmonary impairment which would prevent him from performing his last coal mine employment on a sustained basis. *Id.* Under cardiopulmonary diagnoses, he listed pneumoconiosis and cardiac arrhythmia, and he opined that those diagnoses contributed to the Claimant's impairment to a major extent. *Id.*

(2) **Dr. D.L. Rasmussen** examined the Claimant on October 2, 2003 for the Claimant (DX 40). He also recorded a history with symptomatology, and noted that Claimant had complained of shortness of breath dating from 15 or 16 years before. *Id.* He stated that the ventilatory function studies showed moderate, partially reversible obstructive ventilatory impairment; the single breath carbon monoxide diffusing capacity was moderately reduced; the total lung capacity was normal; the residual volume was moderately increased; there was moderate resting hypoxia; and an incremental treadmill exercise study showed a moderate increase in VD/VT ratio, marked impairment in oxygen transfer, and marked hypoxia. *Id.* Dr. Rasmussen interpreted the studies taken during his examination as revealing a marked loss of lung function and he concluded that the Claimant did not retain the pulmonary capacity to perform his last regular coal mine job. *Id.* He attributed the cause to the two risk factors of cigarette smoking and coal mine dust exposure, both of which caused similar destruction of lung tissue. *Id.* However, he stated that coal mine dust exposure also caused interstitial fibrosis, which was consistent with Claimant's pattern of marked impairment in oxygen transfer in the presence of only minimal ventilatory impairment, and he opined that the Claimant's coal mine dust exposure was a major contributing factor. *Id.*

(3) **Dr. George Zaldivar** examined Claimant on August 14, 2002 and again on August 11, 2004 on behalf of the Employer and he had his deposition taken on February 7, 2005 (EX 8, EX 11). In an October 18, 2004 report, he opined that from a pulmonary standpoint, Claimant was not capable of performing his usual coal mining work or work requiring similar exertion. (EX 8). He discussed the test results and pattern of impairment further at his deposition. *Id.* At that time, he stated that the respiratory impairment shown on spirometry was mild and that Claimant's mild airway obstruction would not be disabling. *Id* .at 18 to 19. He agreed with Dr. Rasmussen that the Claimant's disability resulted from a marked impairment in oxygen transfer. *Id* .at 31 to 32. However, he disagreed that the pattern of impairment was consistent with coal mine dust exposure. *Id.* at 32 to 33. He noted that the disability had improved from the time of Dr. Rasmussen's examination which meant that there was fluctuation in the breathing tests due to active inflammation in the airways, which was inconsistent with coal worker's pneumoconiosis. *Id.* at 26 to 28. Moreover, he disputed Dr. Rasmussen's claim that coal mine dust exposure caused interstitial fibrosis and he stated that interstitial fibrosis was caused by cigarette smoking. *Id.* at 28 to 31. Dr. Zaldivar was given a smoking history of one pack per day from Claimant's 20's until the year 2000, and he noted a total of 38 pack years recorded by Dr. Rasmussen. *Id.* at 17 to 18.

(4) **Dr. Peter G. Tuteur**, who reviewed the records, prepared a report on January 10, 2005 (EX 10).[7] Dr. Tuteur discussed the test results and what they meant, as well as the significant findings of dyspnea and exercise intolerance, but he appears to be totally confused as

[7] In reaching his conclusions, Dr. Tuteur has relied upon some inadmissible evidence, including his own x-ray interpretations. I will nevertheless consider his opinion to the extent that it is not inextricably intertwined with the inadmissible evidence.

to what the test results show. *Id.* He did not squarely address the issue of whether the Claimant was totally disabled. *Id.* He noted the absence of evidence of significant cardiac disease; he noted that the CT scans did not show emphysema or an interstitial pulmonary process; he found no evidence of pulmonary emboli or a left to right shunt at the cardiac or pulmonary level; and he disagreed with Dr. Rasmussen and Dr. Zaldivar that there was airway obstruction. *Id.* He did note the presence of simple chronic bronchitis, which he found to be consistent with the waxing and waning of the Claimant's condition. *Id.* He stated that questions of why there was an impairment of gas exchange that worsened during exercise and why there was diffusion impairment were not answered by the available data. *Id.* The only thing he was certain of is that the Claimant's impairment was not due to coal mine dust exposure. *Id.*

While these reports are of interest on the issue of the etiology of the disability, Drs. Ranavaya, Rasmussen, and Zaldivar agree that the Claimant is disabled from a respiratory standpoint based upon his exercise gas exchange values, and Dr. Tuteur has not said anything in his report that would undermine that conclusion.

In view of the above, I find that the Claimant has established total disability based upon the arterial blood gases and medical opinions, and the nonqualifying pulmonary function studies and absence of cor pulmonale or congestive heart failure do not undermine that finding. As noted above, in considering the blood gas studies along with the Claimant's job description, I found that the arterial blood gases supported a finding that he was totally disabled and not capable of performing his last and usual coal mine employment as a continuous miner operator. The medical opinion evidence reinforces that finding, as the physicians have reached the same conclusion based upon a review of the entire record. Claimant has therefore established a basis for modification (as well as a basis for reopening of the subsequent claim) and this claim may be considered on the merits.

Existence of Pneumoconiosis

In reviewing the evidence on the issue of pneumoconiosis, I must take into consideration the fact that it is the Claimant's burden of proof on that issue as with all others. In this regard, the Supreme Court has made it clear that the burden of proof in a black lung claim lies with the claimant, and if the evidence is evenly balanced, the claimant must lose. In *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994), the Supreme Court invalidated the "true doubt" rule, which gave the benefit of the doubt to claimants.

"Pneumoconiosis," commonly known as "black lung disease," is defined as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 20 C.F.R. §718.201(a) (2002). The definition has been modified to expressly include "both medical, or 'clinical,' pneumoconiosis and statutory, or 'legal' pneumoconiosis." *Id.* The regulations define legal pneumoconiosis as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment" and explain that "[t]his definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2) (2002). The section continues by stating that "'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially

aggravated by, dust exposure in coal mine employment." *Id.* at §718.201(b). Thus, a claimant miner who cannot prove clinical pneumoconiosis may prove the existence of legal pneumoconiosis if he or she can show that his or her lung condition was substantially aggravated by coal mine employment.

The regulations (in section 718.202(a)) provide several means of establishing the existence of pneumoconiosis: (1) a chest x-ray meeting criteria set forth in 20 C.F.R. §718.102, and in the event of conflicting x-ray reports, consideration is to be given to the radiological qualifications of the persons interpreting the x-rays; (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. §718.106; (3) application of the irrebuttable presumption for "complicated pneumoconiosis" set forth in 20 C.F.R. §718.304 and two additional presumptions set forth in §718.305 and §718.306; or (4) a determination of the existence of pneumoconiosis made by a physician exercising sound judgment, based upon objective medical evidence and supported by a reasoned medical opinion. 20 C.F.R. §718.202(a)(1) - (4) (2002). A claimant must establish pneumoconiosis by a preponderance of the evidence after all of the evidence under each section is weighed together. *Island Creek Coal Co. v. Compton,* 211 F.3d 203 (4th Cir. 2000). Finally, under section 718.107, other medical evidence, and specifically the results of medically acceptable tests or procedures which tend to demonstrate the presence or absence of pneumoconiosis, may be submitted and considered.

X-ray Evidence. Claimant has not proved the existence of pneumoconiosis by a preponderance of the x-ray evidence submitted in connection with this claim, which is summarized in the table below.

Exhibit No.	**Date of X-ray/ Reading**	**Physician/ Qualifications**	**Interpretation**
DX 11 Director	**March 20, 2001** Same	M. Ranavaya B-reader[8]	Pneumoconiosis, category 1/2, type p/q opacities, all 6 zones. Prominent bilat. hila, etiology ?? Recommend further studies to rule out other progressive. pathology. Quality level 1.
DX 11 (quality only) Director	March 20, 2001 May 17, 2001	C. Binns BCR, B-reader	Quality level 2 – Dark.
EX 3 Employer Rebuttal	March 20, 2001 August 27, 2002	W. Scott BCR, B-reader	Negative for pneumoconiosis; Surgical clips, left hemi diaphragm elevation, obesity. Quality level 2 (underexposure)
EX 1 Employer Initial	**August 14, 2002** September 11, 2002	P. Wheeler BCR, B-reader	Negative for pneumoconiosis. Probable coronary artery bypass surgery; obesity contributes to underexposure. Quality level 2 (underexposure).

[8] "B-reader" refers to a B-reader certified by NIOSH and "BCR" refers to a board certified radiologist.

Exhibit No.	Date of X-ray/ Reading	Physician/ Qualifications	Interpretation
DX 40 Claimant's Modification	**October 2, 2003** Same	M. Patel BCR, B-reader	Pneumoconiosis, category 1/1, type p/s opacities, all 6 zones. Status post sternotomy. Quality level 2 (underexposed).
EX 2 Employer's Modification	**August 11, 2004** August 20, 2004	J. Scatarige BCR, B-reader	Negative for pneumoconiosis. Status post CABG [bypass]; "Increased lung markings [consistent with] underexposure – doubt diffuse lung disease." Quality level 2, light, poor contrast, underexposure.

The Benefits Review Board has held that it is proper to accord greater weight to the interpretation of a B-reader or Board-certified Radiologist over that of a physician without these specialized qualifications. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Allen v. Riley Hall Coal Co.*, 6 B.L.R. 1-376 (1983). Moreover, an interpretation by a dually-qualified B-reader and Board-certified radiologist may be accorded greater weight than that of a B-reader. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Sheckler v. Clinchfield Coal Co*., 7 B.L.R. 1-128 (1984).

Here, there is a disagreement among the dually qualified readers as to whether the Claimant suffers from pneumoconiosis. The March 20, 2001 x-ray was interpreted as positive for pneumoconiosis by a B-reader, but a more qualified reader, who was dually qualified as a B-reader and board certified radiologist, found the x-ray to be negative for pneumoconiosis. The single reader of the August 14, 2002 x-ray, who was dually qualified, found the x-ray to be negative for pneumoconiosis, while the single reader of the October 2, 2003 x-ray and the single reader of the August 11, 2004 x-ray, both of whom were dually qualified, found those x-rays to be negative for pneumoconiosis.

In view of the above, I find that the preponderance of the x-ray readings are negative for pneumoconiosis.

If the x-ray readings from the prior claims are considered, there is also a disagreement among the readers, including the dually qualified readers, as to whether the Claimant suffers from pneumoconiosis.[9] Two B-readers of the July 16, 1997 x-ray (Drs. Ranavaya and Gaziano) found it to be positive for pneumoconiosis but the single dually qualified reader to interpret that x-ray (Dr. Cole) found it to be negative. The two B-readers of the September 22, 1999 x-ray (Drs. Ranavaya and Navani), one of whom was dually qualified (Dr. Navani), found it to be positive for pneumoconiosis. (DX 1). I find the evidence from the earlier claims to be in equipoise on the issue. When it is considered along with the x-ray evidence for this claim, I still find that the evidence does not preponderate in favor of a finding of pneumoconiosis.

[9] Although reference to x-ray readings appears in the opinion of the state worker's compensation board, these references do not satisfy the regulatory criteria for x-ray interpretations. 20 C.F.R. § 718.102.

Thus, Claimant cannot establish pneumoconiosis based upon the x-ray evidence under section 718.202(a)(1).

Biopsy Evidence. As there is no biopsy evidence, Claimant has failed to establish the presence of the disease under 20 C.F.R. §718.202(a)(2).

Complicated Pneumoconiosis and Other Presumptions. A finding of "complicated pneumoconiosis" under 20 C.F.R. §718.304 results in an irrebuttable presumption of total disability. There is no evidence of complicated pneumoconiosis. I therefore find the section 718.304 presumption is inapplicable. The additional presumptions mentioned in section 718.202(a)(3), which are set forth in 20 C.F.R. §718.305 and 20 C.F.R. §718.306, are also inapplicable, inter alia, because they do not apply to claims filed after January 1, 1982 or June 30, 1982, respectively, and section 718.306 only applies to death claims.

Medical Opinions on Pneumoconiosis. Claimant has also failed to establish the existence of the disease under 20 C.F.R. §718.202(a)(4) based upon the medical opinion evidence. As noted above, Drs. Ranavaya, Rasmussen, Zaldivar, and Tuteur have rendered opinions on the issue, with Drs. Ranavaya and Rasmussen finding that the Claimant suffers from pneumoconiosis and Drs. Zaldivar and Tuteur finding that he does not.

The opinion of Dr. Ranavaya indicates that the diagnosis of pneumoconiosis is "[b]ased on a 25 year long history of occupational exposure to dust in coal mining (all years spent underground) and radiological evidence of it." (DX 11). Putting aside the somewhat inflated mining history, the opinion is based in part upon the x-ray evidence, which I have already found to not support a finding of pneumoconiosis, so the opinion is entitled to less weight for that reason. Further, although Dr. Ranavaya suggested additional testing, he did not have the benefit of reviewing the CT scan evidence which, as noted below, is negative for the disease. Given the scant rationale stated by Dr. Ranavaya for his opinion apart from the x-rays and coal mining history, I do not find it to be entitled to significant weight.

The opinion of Dr. Rasmussen, while providing more analysis, suffers from the same problems – i.e., it is based in part on the x-ray readings and an inflated coal mining history and he did not have the benefit of the CT scan evidence to review. Specifically, his opinion that the Claimant's coal mine dust exposure was a major contributing factor to his disability was based upon the existence of interstitial fibrosis that the CT scans failed to show.

Dr. Zaldivar has stated the basis for his conclusion that the Claimant does not have pneumoconiosis or any other impairment caused by coal mine dust exposure in detail in both his report and at his deposition. While some of his statements about pneumoconiosis appear odd, such as his statement that it is not manifested by interstitial fibrosis (contrary to statements by Dr. Rasmussen and Dr. Tuteur), on the whole he has pointed to factors that suggest that coal mine dust is not the explanation for the Claimant's impairment. In particular, he has discussed the pattern of impairment and its inconsistency with coal mine dust exposure. Further, he has pointed to the lack of findings on the CT scans, which are more sensitive than x-rays in detecting pneumoconiosis, and he has relied upon his own reading of the CT scan as well as the readings of a dually qualified reader (Dr. Scott, EX 9). (EX 11 at 10 to 15).

Dr. Tuteur's report is confusing in that he does not have a good idea as to what is actually causing the Claimant's condition, apart from the mild bronchitis that he attributes to cigarette smoking. He has discounted essentially every potential cause for the Claimant's respiratory impairment that he can hypothesize, although he leaves open the possibility of recurrent pulmonary emboli. Dr. Tuteur also reviewed the CT scans himself. With respect to coal worker's pneumoconiosis, he states that Claimant does not have the disease of sufficient severity and profusion to produce clinical symptoms or impairment of lung function. In discounting coal mine dust, Dr. Tuteur noted that the waxing and waning of symptomatology was not consistent with coal worker's pneumoconiosis. (EX 10). While interesting, Dr. Tuteur's opinion is too equivocal to be entitled to much weight.

The only medical reports previously of record related to the DOL examinations of the Claimant conducted by Dr. Ranavaya in 1997 and 1999, which add little to the equation, and the opinions of the state worker's compensation board, which do not qualify as reasoned medical opinions within the meaning of the regulations. (DX 1).

Factors to be considered when evaluating medical opinions include the reasoning employed by the physicians and the physicians' credentials. *See Millburn Colliery Co. v. Hicks*, 138 F.3d 524, 536 (4th Cir. 1998). A doctor's opinion that is both reasoned and documented, and is supported by objective medical tests and consistent with all the documentation in the record, is entitled to greater probative weight. *See Fields v. Island Creek Coal Co.,* 10 BLR 1-19, 1-22 (BRB 1987) (stating that a "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis, and that a "reasoned" opinion is one in which the underlying documentation is adequate to support the physician's conclusions). In addition, the new regulation appearing at §718.104(d) allows additional weight to be given to the opinion of a treating physician but requires certain factors, including the nature and duration of the relationship, the frequency of treatment, and the extent of treatment, to be considered.

First, I will consider the credentials of the physicians. Drs. Zaldivar and Tuteur obviously possess the credentials to express an opinion on the Claimant's pulmonary condition as they are board certified in internal medicine and the subspecialty of pulmonary diseases, and both have prestigious academic appointments. Although the credentials of Dr. Ranavaya are not of record, he appears on the list of physicians qualified to perform pulmonary examinations on behalf of the Department of Labor. Dr. Rasmussen's credentials are not of record, but his report indicates that he is board certified in internal medicine and works in the Division of Pulmonary Medicine. I therefore will not discredit the reports of Drs. Ranavaya and Rasmussen because their c.v.s are absent.

Turning to the reports themselves, while I am puzzled by some of his statements, I find that as a whole, Dr. Zaldivar's is the best reasoned and documented, in that he has reviewed all of the relevant evidence, including the CT scans, and has extensively explained the basis for his opinions. He has persuasively explained his conclusion that the Claimant does not suffer from pneumoconiosis or any impairment caused by coal mine dust. I discount the reports of Drs.

Ranavaya, Rasmussen, and Tuteur for the reasons stated above. Accordingly, I find that the preponderance of the medical opinion evidence does not support a finding of pneumoconiosis.

In view of the above, Claimant has not established pneumoconiosis under section 718.202(a)(4).

Other Evidence. The other evidence consists of the interpretations of CT scans taken on July 19, 2001 and August 11, 2004, none of which were positive for pneumoconiosis. (DX 1). Both of these CT scans were interpreted by Drs. Tuteur and Zaldivar, who found them to not support a finding of pneumoconiosis. Furthermore, the August 11, 2004 CT scan was interpreted by a dually qualified B-reader and board-certified radiologist (Dr. William W. Scott, Jr.) who noted the following:

> Scan of chest and upper abdomen with 1 mm supine sections displayed at lung window settings.
>
> Anterior chest surgery.
>
> Artifact, probably from surgical clip near esophageal-gastric junction.
>
> Obesity.
>
> No evidence of silicosis/CWP.

(EX 9). Thus, the Claimant cannot establish pneumoconiosis based upon this evidence.

Section 718.202 as a Whole. Looking at the evidence under section 718.202 as a whole, I find that the evidence on the issue of whether the Claimant has pneumoconiosis as defined in the Act and the regulations fails to preponderate in favor of such a finding. As noted above, Claimant cannot sustain his burden of proof based upon either the x-ray or medical opinion evidence. Moreover, the lack of evidence of silicosis or coal worker's pneumoconiosis on CT scans is of particular significance in view of Dr. Zaldivar's deposition testimony concerning the superiority of CT scan evidence over x-rays. I therefore find that the evidence preponderates against a finding of pneumoconiosis. This claim must therefore be denied based upon the Claimant's failure to establish an essential element of entitlement.

Conclusion

Although Claimant has established a basis for modification based upon total disability, the evidence does not support a finding of pneumoconiosis; therefore, Claimant cannot establish a necessary element of a claim for benefits under the Black Lung Benefits Act. Accordingly, this claim must be denied and it is unnecessary to address the remaining issues.

ORDER

IT IS HEREBY ORDERED that the claim of Avery R. Morgan for black lung benefits under the Act be, and hereby is **DENIED.**

A

PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. §725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of this Notice of Appeal must also be served on the Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.